

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 308

July 14, 1995, 2:50 p.m.
Page S-9984 Temp. Record

REGULATORY REFORM/Protection from Unfair Penalties

SUBJECT: Comprehensive Regulatory Reform Act of 1995 . . . S. 343. Hutchison modified amendment No. 1439 to the Dole/Johnston substitute amendment No. 1487.

ACTION: AMENDMENT AGREED TO, 80-0

SYNOPSIS: As reported, S. 343 will make changes to reform the regulatory process. The Dole/Johnston substitute amendment would modify the bill in accordance with suggestions made by Senate Democrats, the Administration, and the American Bar Association. The amendment would: recodify and modify the Administrative Procedures Act (APA); impose judicially reviewable obligations on Federal agencies to craft rules in which the benefits justify the costs and to use peer reviewed, standardized risk assessments; expand the Regulatory Flexibility Act; reform the Delaney Clause; and strengthen congressional oversight.

The Hutchison modified amendment would amend the Administrative Procedures Act to ban the imposition of criminal or civil penalties for the violation of a rule if the court or agency, as appropriate:

1) found that the rule and other information reasonably available to the defendant failed to give the defendant fair warning of the conduct that the rule prohibited or required; or

2) found that the defendant, based on language of the rule as published in the FEDERAL REGISTER and on other available information, in good faith thought he or she was in compliance with, exempt from, or otherwise not subject to the rule; or

3) found that the defendant engaged in the conduct alleged to violate the rule in reasonable reliance on a written notification from an appropriate official that the conduct was in compliance with, exempt from, or otherwise not subject to the rule, provided that the material facts had been given to the official who issued the notice, and provided that the defendant had sought the advice in good faith.

The amendment would apply to any action for which a final unappealable judicial order had not been issued before the effective date of this bill.

(See other side)

YEAS (80)				NAYS (0)		NOT VOTING (20)	
Republican (45 or 100%)		Democrats (35 or 100%)		Republicans (0 or 0%)	Democrats (0 or 0%)	Republicans (9)	Democrats (11)
Abraham	Hutchison	Akaka	Johnston			Bond ⁻²	Bingaman ⁻²
Ashcroft	Inhofe	Baucus	Kerrey			Burns ⁻²	Boxer ⁻²
Bennett	Jeffords	Biden	Kerry			Campbell ⁻²	Bradley ⁻²
Brown	Kassebaum	Breaux	Kohl			Cohen ⁻²	Bumpers ⁻²
Chafee	Kempthorne	Bryan	Lautenberg			Gramm ⁻²	Glenn ⁻²
Coats	Kyl	Byrd	Leahy			Lugar ⁻²	Harkin ⁻²
Cochran	Lott	Conrad	Levin			McCain ⁻²	Hollings ⁻²
Coverdell	Mack	Daschle	Lieberman			Shelby ⁻²	Kennedy ⁻²
Craig	McConnell	Dodd	Moseley-Braun			Snowe ⁻²	Mikulski ⁻²
D'Amato	Murkowski	Dorgan	Moynihan				Pryor ⁻²
DeWine	Nickles	Exon	Murray				Sarbanes ⁻²
Dole	Packwood	Feingold	Nunn				
Domenici	Pressler	Feinstein	Pell				
Faircloth	Roth	Ford	Reid				
Frist	Santorum	Graham	Robb				
Gorton	Simpson	Heflin	Rockefeller				
Grams	Smith	Inouye	Simon				
Grassley	Specter		Wellstone				
Gregg	Stevens						
Hatch	Thomas						
Hatfield	Thompson						
Helms	Thurmond						
	Warner						

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

Those favoring the amendment contended:

The Hutchison amendment is about simple fairness. Regulatory agencies should not be allowed to seek criminal and civil penalties when due process and fair notice are not followed. Unfortunately, they often do. In some cases, people have being fined for activities that they had no reasonable way of knowing were prohibited by regulations because the agency had failed to give any sort of public notice that they were. In other cases, they have acted in the good faith belief that they were fully complying with regulations and have still been subjected to massive criminal and civil fines. Most egregiously, in still other cases, they have asked for an agency's explicit written advice, followed it to the letter, and then have been fined by the agency for doing exactly what it told them to do. In effect, and sometimes explicitly, people and corporations receive ex post facto punishments for violating regulations. The punishments are explicitly retroactive when agencies make new interpretations or new factual determinations on old rules, and then prosecute people and corporations for having followed the agency's old interpretation, which, of course, they had been required to do at the time. The abuses are extreme, and Congress bears a large share of the blame for creating this situation. For example, Congress enacted the open-ended environmental enforcement statutes which call for penalties of up to \$25,000 a day in civil cases, and months and even years in Federal prison for criminal cases in which no proof of actual damage to the environment or even intent to violate a single provision of any Federal regulation even needs to be presented. The Hutchison amendment would correct this situation by adding a new section to the Administrative Procedures Act to prevent penalties from being imposed for unpublished, inconsistent and retroactive agency interpretations in civil and criminal actions. It would codify into administrative law the fundamental principle that an agency must give the regulated community adequate notice of its interpretation of a statute or any rule enforcing that interpretation through civil or criminal penalties. This amendment deserves our unanimous support.

While favoring the amendment, some Senators expressed the following reservations:

When the amendment was first offered, we had several concerns with the actual effect some of the provisions of the Hutchison amendment may have had, though we strongly supported, and still strongly support, the concept behind the amendment. The sponsor of the amendment worked with us to address our concerns, and has proposed a modification that addresses most of them. We are still not totally satisfied with a couple of provisions, particularly the retroactive application of the amendment and the ability of a person to escape civil penalties by asserting that he or she acted in good faith, but the amendment is now acceptable, and we are pleased to vote for its adoption.

No arguments were expressed in opposition to the amendment.